IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

IN RE: SANTA FE NATURAL TOBACCO COMPANY MARKETING AND SALES PRACTICES LITIGATION,

NO. 16-MD-2695 JB/LF

VOLUME 2

Transcript of Motion Proceedings before The Honorable James O. Browning, United States District Judge, Albuquerque, Bernalillo County, New Mexico, commencing on July 20, 2017.

For the Plaintiffs: Ms. Melissa Wolchansky; Ms. Randi McGinn; Ms. Kathy Love; Mr. Michael Reese; Mr. Scott Schlesinger; Mr. John Bienvenu; Mr. Reed Bienvenu; Ms. Erika Anderson; Mr. John Yanchunis; Mr. Nicholas Koluncich

For the Plaintiffs (Via telephone): Mr. Jeffrey Haberman; Mr. Jonathan Gdanski

For the Defendants: Mr. Andrew Schultz; Mr. Peter Biersteker; Mr. David Monte; Mr. Jordan Von Bokern

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THE COURT: Good morning everyone. I appreciate everyone making themselves available to me this morning.

All right. The Court will call In Re: Santa Fe Natural Tobacco Company Marketing and Sales Practices and Products Liability Litigation, Civil Matter No. 16-MD-2695 JB/LF.

If counsel will enter their appearances. Let's start with the plaintiffs.

MS. McGINN: Your Honor, Randi McGinn and Kathy Love, liaison counsel.

THE COURT: All right. Ms. McGinn, Ms. Love, good morning to you.

MS. WOLCHANSKY: Good morning, Your Honor. Melissa Wolchansky, co-lead counsel.

THE COURT: All right. Ms. Wolchansky, good morning to you.

And Mr. Reese?

MR. REESE: Good morning, Your Honor. Michael Reese.

THE COURT: All right. Mr. Reese, good morning to you.

And then in the Haksal case, the Bienvenus?

MR. BIENVENU: Good morning, Your Honor. John Bienvenu on behalf of plaintiffs in the Haksal

matter.

THE COURT: All right. Mr. Bienvenu.

MR. REED BIENVENU: Good morning, Your Honor. Reed Bienvenu on behalf of plaintiffs.

THE COURT: All right. Mr. Bienvenu, good morning to you.

And in the White matter? Ms. Anderson?

MS. ANDERSON: Erika Anderson, Your Honor.

THE COURT: All right. Ms. Anderson, good morning to you.

And then in the Okstad matter? Mr. Schlesinger?

MS. SCHLESINGER: Good morning, Judge.

THE COURT: How are you doing today?

MS. SCHLESINGER: Good. Good to see you again, Your Honor.

THE COURT: Good morning to you.

And then appearing telephonically in that matter?

MR. HABERMAN: Good morning, Judge. Jeffrey Haberman, Schlesinger Law Firm.

THE COURT: All right. Mr. Haberman.

And Mr. Gdanski, are you there?

MR. GDANSKI: Good morning, Judge. Jonathan Gdanski, also with Schlesinger Law Firm.

THE COURT: All right. Mr. Haberman, Mr. Gdanski, good morning to you.

And in the Waldo matter?

MR. YANCHUNIS: Good morning, Your Honor. John Yanchunis. I will not be speaking today other than my introduction this morning. And I would ask -- I mentioned to opposing counsel -- I've got a matter before a U.S. District Judge in New Jersey at 9:30 that I could not move. And I apologize for that. And I need to handle that hearing telephonically, so I'll step out in about a half hour or less. I apologize for that.

THE COURT: All right. Don't worry about it. Mr. Yanchunis, good morning to you.

And Mr. Koluncich, are you going to enter an appearance or just sit back there?

MR. KOLUNCICH: Good morning, Your Honor. I may as well. Nicholas Koluncich on behalf of plaintiffs.

THE COURT: All right. Good to see you, Mr. Koluncich.

Anyone else need to enter an appearance? Telephone? Here?

All right. Let me -- since we've been together, I've been working on our opinion. And I'd

say I have about 40 pages done. Some work on the facts, some on the procedural, and then some work on a couple of issues that we worked on last time. Let me talk to you a little bit about a couple of them. I don't think my views have changed on two of them that I've worked on, but give you a little bit more thought as I put this together.

Let me start with the first issue in the motion to dismiss, which is the preemptive scope of the FTC's consent order authorizing Santa Fe Tobacco's use of the terms "natural" and "additive-free." The question being whether the FTC's consent order authorizing Santa Fe Tobacco's use of "additive-free" and other substantially similar terms, "natural," impliedly preempts the plaintiffs' claims to the extent they rely upon a safer cigarette theory; i.e., that they were misled into believing that the NAS cigarettes are safer than alternatives.

What I understand the defendants to be arguing is that this theory, if it's successful, would pose a direct obstacle to the purposes and objectives of federal policy, as manifested by the order, and primarily relying on page 11 of their motion to dismiss, and their reliance specifically on

the Tenth Circuit's decision in United States Airways versus O'Donnell, a 2010 decision.

As I indicated when we were here together on June 9, I continue to disagree that the consent order preempts the plaintiffs' safer cigarette theory, and am still inclined to deny the motion to dismiss as to that theory.

Preemption analysis begins with the assumption that the historic police powers of the states are not to be superseded by federal law unless that was the clear and manifest purpose of Congress. And that's Medtronic. And then in the Cipollone versus Liggett Group cases, again, they applied a, quote, "presumption against the preemption of state police power regulations." As the Supreme Court has repeatedly stated, Congress' -- or in this case a federal agency's -- intent, in preemption analysis, intent is the "ultimate touchstone." And Wyeth versus Levine says that.

Here, customer protection law, including cigarette advertising regulations, is a field that's traditionally reserved for the state's historic police powers. Some of these cases get a little old, but talk about that. But in Packer Corp. versus State of Utah the Supreme Court said, "The state may

under the police power regulate the business of selling tobacco products and advertising connected therewith." So to prevail on their motion to dismiss, the defendants must overcome a strong presumption against preemption. That's what Cipollone says.

Preemption may be express or implied. The Gade case makes that clear. As relevant here, implied conflict preemption occurs where, quote, "compliance with both federal and state regulation is a physical impossibility," Florida Lime and Avocado Growers, which is an older case says that. Or even an older case, Hines versus Davidowitz, where state law "stands" -- I'm quoting again -- "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Justice Thomas, in his concurring opinion in Pharmacy Research and Manufacturers said, "Obstacle preemption turns on whether the goals of a federal statute are frustrated by the effect of the state law." And whether an obstacle is sufficient for preemption purposes "is a matter of judgment, to be informed by examining the federal law as a whole and identifying its purpose and intended effects." The Tenth Circuit said that in the Barber case. As with all forms of

preemption, the Supreme Court has emphasized the need for clear intent when applying obstacle preemption. And the Supreme Court said that as recently as 2012, in Arizona versus United States.

The defendants rely on a handful of cases which they contend establish the consent order, such as the one at issue here, have preemptive effect. And they rely, among others, on the Feikema versus Texaco case from the Fourth Circuit, and GMC case from the Second Circuit. Again, those are 1990 cases. The defendants, for example, quote the Fourth Circuit statement in Feikema that when an agency -- and I'm quoting -- "acting with invalid statutory authority enters a consent order, that order will also preempt conflicting state regulation, including a federal court order based on state common law." That's a quote from Feikema that's right in the motion to dismiss. The defendants also quote the Second Circuit's case in GMC that an FTC, quote, "consent order reflecting a reasonable policy choice of a federal agency and issued pursuant to congressional grant of authority may preempt state legislation."

Other courts have -- rightly in my view -- criticized these cases' suggestion that consent

decrees may foreclose the rights of nonparties. In Wabash Valley Power Association, from the Seventh Circuit, Judge Easterbrook said that, quote, "because neither the state nor the consumers were parties to the FTC's case in GMC versus Abrams, it is hard to understand how the decree could blot out their claims based on state law." Judge Easterbrook reasoned that, rather, I'm quoting, "whether the decree has such an effect should depend on whether it was adopted by the agency as its own policy following the procedures the APA requires; then the preemption would come from substantive rules rather than the parties' assent." Easterbrook cited an older case, United States v. AT&T, saying that an antitrust consent decree may preempt state law when the states have had an opportunity to intervene and their contentions have been resolved on the merits. Here, the consent decree was issued without full notice or opportunity for comment, or pursuant to informal procedures described by the APA. It was thus not adopted by the FTC as, quote, using Easterbrook's words, "as its own policy following the procedures the APA requires."

Also illustrative are the Fourth Circuit's own subsequent statements limiting the scope of its

analysis in Feikema versus Texaco. Specifically Cavallo versus Star Enterprise. Again, these are a little bit older cases, but in 1996, in the Cavallo case, the Fourth Circuit stated that an entity, quote, "cannot be held liable for activities in conformity" -- and that word is emphasized in the Fourth Circuit's own language -- "with the EPA orders," but held "that does not end the inquiry" whether a consent order preempts a third-party action based on state law. The Fourth Circuit stated that, quote, "damages claims conflict with a consent decree, and are thus preempted, only if the allegedly tortious activities (1) were required, directed, or supervised by the agency, and (2) were performed properly." The Fourth Circuit added that, with respect to the plaintiffs' claims in that case, "incidents of improper operation, supervision, management, design, installation, repair, and updating of the waste site or its equipment may be actionable if not compelled by the EPA orders." Here, the defendants are not "required, directed, or supervised by" the FTC with respect to their use of the terms "additive-free" or "natural." The FTC's consent order did not compel Santa Fe Tobacco to use those terms in their advertising or cigarette

packaging; rather, it simply authorized the use of those terms if they were accompanied by a subsequent disclosure. Judge Vazquez, in her Altria case, Mulford, said, "The FTC found the use of such descriptors permissible if they were accompanied by disclosure." And I think that's what's going on here. Thus, even relying on the defendants' cases, the consent order is not preemptive of the plaintiffs' safer cigarette theory.

The Second Circuit has also clarified that consent decrees, although binding on the parties, do not preempt third-party claims. In 1999, in United States v. City of New York, the Second Circuit rather plainly stated that, quote, "those who are not parties to a consent decree are free to challenge the decree and actions taken under it." In reaching this conclusion, the Second Circuit relied upon well-settled Supreme Court precedent and a -- and I'm quoting here from Martin versus Wilks, that "a judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." I realize Martin has been somewhat superseded by some civil rights litigation, but I think on that point it was only superseded as some

employment-related claims.

In going back to Wabash, Easterbrook said, "Martin v. Wilks holds that a consent decree may not foreclose the rights of nonparties." And the Supreme Court again reaffirmed this principle in 2008, in the Altria Group versus Good case. "A consent order is in any event only binding on the parties to the agreement." The defendants respond that this analysis is inapposite, because Santa Fe Tobacco was a party to the consent decree. That consent decree binds Santa Fe Tobacco, however, but that doesn't mean it binds third parties who had no opportunity to intervene or state their positions as to the subject matter.

Further, as Second Circuit stated in GMC versus Abrams, quote, "the mere fact that the instant order has been entered, however, is insufficient to preclude supplemental state regulation." Rather, and again quoting, "as with any preemption analysis, the lodestar of our inquiry is the intent of the FTC in entering into the consent order." And there, the Second Circuit cited California Federal Savings from the Supreme Court. It's difficult to see how the consent order is designed to preempt any third-party state law claims. According to the defendants, the

FTC intended in the consent order to conclusively establish that certain terms are not misleading, thus preempting any state law actions alleging the contrary. But I don't read the consent order to evince such intent. The consent order simply states that the FTC, quote, "shall not prohibit" close quote, Santa Fe Tobacco from using "additive-free" and similar terms. And to me, such language does not evince an intent to foreclose state law actions alleging misleading advertising practices.

Let me give a few comments also on the second issue in the motion to dismiss, and that is the issue on the First Amendment protection. Under the Central Hudson framework for commercial speech, the question as I understand it is: Do the plaintiffs plausibly allege that the defendants' representations that their Natural American Tobacco cigarettes are "natural," "organic," and "additive-free," are not protected commercial speech under the First Amendment? And I said I thought that was the case on June 9. And my research continues to make me believe that's the right inclination here.

As we know from Ashcroft and Twombly, the claim is facially plausible, quote, "when the pleaded factual content allows the court to draw the

reasonable inference that the defendant is liable for the misconduct alleged." Accepting the facts alleged in the plaintiffs' complaint as true, and taken in the light most favorable to the plaintiffs, the plaintiffs' complaint plausibly alleges that the defendants' representations are not protected commercial speech. It is plausible that the terms "natural," "organic," and "additive-free" are inherently misleading and not merely potentially misleading or truthful. It's also plausible that the defendants' advertising scheme, as a whole, is inherently misleading. The plaintiffs' complaint, I think, bypasses the full Central Hudson balancing test. So accepting the facts alleged in the plaintiffs' complaint as true, and taken in the light most favorable to the plaintiffs, the plaintiffs' complaint plausibly alleges sufficient facts to meet the three prongs of the Central Hudson balancing test. Accordingly, the Court is still inclined to deny the motion to dismiss that claim.

Commercial speech is defined as "speech that does no more than propose a commercial transaction." We learned that from Virginia State Board of Pharmacy, and also from Central Hudson, in 1980. In Central Hudson, "The Commission's order

restricts only commercial speech; that is, expression related solely to the economic interests of the speaker and its audience." The following characteristics indicate that the speech is commercial speech: If the speech is contained in an advertisement; two, if it is made with an economic motive; or three, if it refers to a specific product. The Tenth Circuit said that in Procter & Gamble versus Haugen. A representation, however, is not automatically commercial speech because it contains one or more of the preceding characteristics. Again, the Tenth Circuit emphasized that in Procter & Gamble.

Central Hudson provides an analytical framework to determine what kind of commercial speech is entitled to First Amendment protection. The Constitution, quote, "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." The government has less power to regulate lawful and nonmisleading commercial speech. Therefore, the Court must perform a threshold inquiry, before proceeding to the Central Hudson balancing test, to determine whether the speech is protected commercial speech, nonmisleading speech that concerns lawful activity. And the Tenth

Circuit said that in the Revo case in 1997.

The plaintiffs plausibly allege that the defendants' representations are inherently misleading. Supreme Court jurisdiction has drawn distinctions between misleading commercial speech, potentially misleading commercial speech, and nonmisleading commercial speech. The Supreme Court drew those distinctions in the RMJ case. The citation that I drew that from indicates that the statement of the law is included in a summary of commercial speech, quote, "in the context of advertising for professional services." Circuit courts, however, generally do not seem to find this a notable distinction and have applied the case to other areas of commercial speech.

I couldn't find a Tenth Circuit case that had done that, but that are number of other circuit cases, including the Sixth Circuit in a tobacco case. So that is one area I'll have to explore to make sure I'm comfortable with it, but I did notice that we didn't have a Tenth on that.

Misleading commercial speech may be prohibited entirely, according to RMJ. The Central Hudson balancing test applies when the speech is potentially misleading or when it is truthful.

States may impose restrictions when "the particular content or method of the advertising suggests that it is inherently misleading" or when it is truthful. Both RMJ and Revo say that. States may impose restrictions when "the particular content or method of advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse." Again, that's from the RMJ case. And this is what the Supreme Court states in RMJ: "The particular content or method of the advertising suggests that it is inherently misleading," and then I emphasize this language, "or when experience has proved that in fact such advertising is subject to abuse." The Fourth Circuit -- the Ninth Circuit has stated in American Academy of Pain Management that when "advertising is inherently likely to deceive" -- and again, I emphasize this language -- "or where the record indicates that a particular form or method of advertising has in fact been deceptive," the advertising enjoys no First Amendment protection. These statements almost seem to indicate that the defendants' arguments are not ripe at the motion to dismiss stage, when the Court must assume the complaint's assertions to be true. The Tenth Circuit

states that it's a particular mode of communication is inherently misleading when it is "capable of being presented in a way that is not deceptive." That was from Revo.

Speech that is not inherently misleading can be potentially misleading. Peel from the Supreme Court has said that. Commercial speech devoid of intrinsic meaning can still be inherently misleading, especially if such speech has historically been used to mislead the public. Factually true statements may be misleading if they invite inferences that lead to a conclusion lacking support or rigorous review. The Supreme Court said in Peel, "We must assume that some consumers will infer from petitioner's statement that his qualifications in the area of civil trial advocacy exceed the general qualifications for admission to a state bar. Thus, if the certification had been issued by an organization that had made no inquiry into petitioner's fitness, or by one that issues certificates indiscriminately for a price, the statement, even if true, could be misleading." D.C. Circuit in Pearson has said disclaimers alone do not necessarily cure misleading advertising, suggesting the possibility that some advertising is so misleading that it is incurable by disclaimer.

So going back to Central Hudson, the plaintiffs plausibly allege that the defendants' representations are, quote, "inherently misleading." For example, the plaintiffs have noted that, despite the defendants' disclaimers, the FTC has still sent warning letters to the defendants that indicate that the advertising is misleading. Defendants contend in their motions and memoranda that it's impossible for the term "natural" and "organic" to be "inherently misleading" when there is no discernable standard for "natural." Terms that lack "intrinsic meaning" can be -- again, going back to Peel -- inherently misleading, however, especially if such speech has historically been used to mislead the public. The complaint contains conclusory allegations regarding the history of deception in tobacco advertising, but the complaint also cites a number of studies demonstrating deception over a period of time. The defendants claim that their disclaimers; i.e., "no additives in our tobacco does not mean a safer cigarette," makes it impossible to mislead customers into thinking that the cigarette is safe. But Pearson indicates that disclaimers by themselves, however, do not always cure misleading advertising.

As for the term "additive-free," defendants

contend that it's impossible to mislead consumers with "additive-free" on menthol cigarettes when they are clearly advertised and labeled as menthol cigarettes. But the thrust of the complaint is that the advertising as a whole gives rise to a misleading perception of safer or healthier cigarettes. It is possible to mislead with true statements, especially if the inferences lead to a dubious conclusion that is unsupported or lacking in rigorous review. Again, that's what the Supreme Court said in Peel.

So taking the allegations in the complaint as true, the plaintiffs plausibly allege that the advertising as a whole is inherently misleading. The Tenth Circuit standard that the information must be "incapable of being presented in a way that is not deceptive," the Revo standard is stringent. Here, given the history of FTC warnings, it is plausible that the defendants' representations mislead consumers and cannot be presented in a nonmisleading way. The defendants' entire advertising campaign relies upon associations of naturalness, ties to the earth, and conscious decisions to stay natural. As the plaintiffs' complaint alleges, those themes are often associated with better health choices. It is plausible that cigarettes and those associations

cannot be paired together without being misleading.

Turning to the Central Hudson balancing test, the analysis for the Central Hudson balancing test has the following elements: One, whether the government interests in regulation is substantial; two, to whether the regulation directly advances the government interest; and three, whether the regulation is no more burdensome than necessary to serve the interest. That's Revo and Central Hudson. Courts must evaluate the precise interest offered by the party in favor of the regulation. Revo indicates that a regulation will not be supported if it provides ineffective or remote support for the proffered purpose. Revo also indicates that the purported harm must be real and the regulation must alleviate it to a material degree.

Assuming that the defendants' representations are protected commercial speech, the Central Hudson balancing testing applies. The plaintiffs then must plausibly allege the following: One, that there is a substantial interest in regulating deceptive advertising practices through the judiciary and state consumer protection statutes; two, that the regulation directly advances the proffered interest; and three, that the regulation is

no more burdensome than necessary to achieve that interest. Construing the complaint's allegations in the light most favorable to the plaintiffs, the Court concludes that the plaintiffs plausibly allege sufficient facts to meet each of the three prongs of the Central Hudson balancing test.

Plaintiffs assert that the substantial interest in regulation is to discourage deceptive business practices. First, the plaintiffs plausibly allege in the complaint that a significant number of people are affected by the defendants' allegedly deceptive advertising practices. The plaintiffs provide legal support to their assertions by citing cases to support the contention that general consumer protection efforts serve a substantial public interest. The plaintiffs contend that they plausibly allege that the remedies they seek, but do not commit to, would be an adequate fit to advance protection against deceptive advertising, injunctive relief to limit the deception and monetary relief to deter the deception. Plaintiffs note that they do not commit to any particular remedies at this time, contending that the Court may shape relief that it determines is proper. Because the Court can shape proper relief later in the case, at the motion to dismiss stage it

seems premature to determine that the plaintiffs' complaint fails the third prong of Central Hudson; i.e., "that the regulation is no more burdensome than necessary to achieve that interest." The judicial regulation has not been determined yet. The plaintiffs therefore plausibly allege that the regulation will directly advance the government's interest in discouraging deceptive business practices. It is also plausible that the Court can craft appropriate relief that is "no more burdensome than necessary" to achieve the government interests.

Accordingly, even assuming the Central Hudson balancing test applies, the complaint "allows the court to draw the reasonable inferences that the defendant is liable for the misconduct alleged." The complaint plausibly alleges that; one, there is a substantial government interest in regulation; two, the regulation directly advances the proffered interest; and three, that the regulation is no more burdensome than necessary to achieve that interest.

So the Court is still inclined to conclude that even assuming the Central Hudson balancing test applies, the complaint plausibly alleges sufficient facts to meet the test. And so, again, the Court is continuing to think it will deny the motion to

dismiss that claim.

All right. Did somebody come on the phone while I was indicating some -- where I was in the work from our last hearing? Did somebody new come on the phone? We may have lost somebody.

All right. I think I failed to get entries of appearance by the defendants. So let me do that at this time. I apologize for that.

MR. SCHULTZ: Not a problem, Your Honor. Andrew Schultz for the defendants.

THE COURT: Mr. Schultz, good morning to you.

MR. BIERSTEKER: Good morning. Peter Biersteker for the defendants.

THE COURT: Mr. Biersteker, good morning to you.

MR. MONTE: Good morning, Judge. David Monte.

THE COURT: Mr. Monte, good to see you again.

MR. VON BOKERN: Good morning, Judge. Jordan Von Bokern for the defendants.

THE COURT: Mr. Von Bokern, good morning to you.

All right. So I have read the supplemental

briefing that has come in. I don't know if the defendants want to have -- make any comments here at the beginning, or if you want to pick up where we left off last time. But it's your motion. I'll let y'all kind of direct how we're going to proceed this morning.

MR. BIERSTEKER: Thank you, Your Honor.

THE COURT: Mr. Biersteker.

MR. BIERSTEKER: Yes. As you may recall -- and I spoke briefly to Ms. Wolchansky last night about this -- when we were here last, I was in the middle of the argument on unjust enrichment. So the first thing I'd like to do today is to complete that argument.

THE COURT: All right.

MR. BIERSTEKER: At the end of which, I understand Your Honor's custom is to allow plaintiffs to respond; we'll go back and forth on that.

THE COURT: Is that all right with you? Does that work for you?

MR. BIERSTEKER: Yes, Your Honor.

And just to lay out what defendants had in mind for the remainder of our argument on the motion today, we thought we would then next take up on the express warranty issue, followed by injunctive relief

and the mootness.

Defendants' intention would be to submit on the papers on two issues, Your Honor, the state statutory claims, including the safe harbors, and the RAI, Reynolds American, Inc., personal jurisdiction motion.

As far as the defense is concerned, we're finished with three issues. The first would be preemption. Your Honor has again reiterated your views on that issue, likewise with the First Amendment.

And finally, as Your Honor noted, there was supplemental briefing on the reasonable consumer issue. But the defendants don't perceive a need to pursue that orally before Your Honor today. That said, as to any issue that the defendants propose Your Honor resolve on the papers, or that we believe we have already adequately addressed, we would be happy to respond to any questions that Your Honor might have, or to provide argument, if Your Honor wishes.

With that, do you want me to proceed, Your Honor?

THE COURT: Yeah, why don't you go ahead. You're going to pick up the unjust enrichment again?

MR. BIERSTEKER: Yes, sir.

To briefly recap, nine of the 12 unjust enrichment claims are barred by the existence of an adequate remedy at law. I generally addressed that point last time. I had started down the road with the state-specific law, having completed four of the nine different states. I was up to New Jersey when Your Honor ended the hearing last time.

So let me start with New Jersey. New Jersey law is clear. Even the cases that were relied upon by the plaintiffs recognize that the existence of an adequate remedy at law bars an unjust enrichment claim. Plaintiffs' only response is to argue that it is premature to address this issue on a motion to dismiss. That's one of their general points that Your Honor may recall I touched on generally last time.

In these nine states, the existence of an adequate remedy at law bars an unjust enrichment claim. There is, however, an exception. And the exception is where the very existence of the adequate remedy at law is in doubt, as, for example, may occur when there is an action at law on a contract and there is doubt about the existence of the contract or whether the contract addresses the conduct at issue.

Here, there is no question about the very existence of the adequate remedy at law. The statutes do exist. They do cover the conduct that is allegedly wrongful. And so I don't think the exception applies.

As to New Jersey, plaintiffs provide no New Jersey authority suggesting that an adequate remedy -- the Adequate Remedy Rule should not be applied at the motion to dismiss stage.

So let's turn to New York. The highest court in New York, the court of appeals, has been unequivocal on two points that I think are dispositive here, in a 2008 decision cited in our brief, Samiento, S-A-M-I-E-N-T-O, versus World Yacht, Inc. It's in our opening brief 58 and our reply at 30. First, the New York Court of Appeals confirmed the general rule that unjust enrichment does not lie, as plaintiffs have an adequate remedy at law. And second, in a firm dismissal, plaintiffs' unjust enrichment claim, before any discovery because a statutory claim was available, just as here.

North Carolina. The North Carolina Supreme Court in a 1992 decision, Embry Construction Group, Inc., cited in our opening brief at 59, and our reply at 31, made clear that the Court's equitable

intervention is obviated when an adequate remedy at law is available to the plaintiff. In the teeth of that precedent the plaintiffs here argue otherwise, based on a recitation of the elements of a prima facie case for unjust enrichment. I would submit, Your Honor, that the elements of an unjust enrichment case presuppose the existence of the claim and teach nothing about the Adequate Remedy at Law Rule.

Plaintiffs once again argue prematurity. That argument fails for the reasons explained last time, and I briefly touched upon earlier here today. Plaintiffs do note that in Embry, the North Carolina Supreme Court declined to dismiss the unjust enrichment claim there. That's true. But the Court did so specifically because the only relevant statute did not supply a remedy for the alleged harm. Here, North Carolina law does supply a statutory remedy. And it is beside the point that plaintiffs may or may not be entitled to that remedy at the end of the day.

Plaintiffs also note in New York, Tompkins versus Key Health Medical Solutions, there, the Court stated that it would be premature to foreclose the plaintiff's unjust enrichment claim. But the Court explained that this was because of questions as to the exact nature of the transactions between the

parties, which seemed to preclude the court from confirming that legal remedies were available for the wrongdoing alleged. In no way did the court in that decision suggest that it was casting doubt at all on the North Carolina Supreme Court's decision in Embry.

Ohio. There is no disagreement that an adequate remedy at law bars an unjust enrichment claim in Ohio. That's been the law of Ohio since at least 1944, when its Supreme Court ruled the case of State, ex rel versus House, cited in our opening brief at page 59.

Plaintiffs rely on their alternative pleading theory. But the very decision they cite, Paikai versus General Motors, states that alternative pleading is allowed under Ohio law, quote, "only in the face of uncertainty as to the existence of a contract, or perhaps uncertainty as to the contract's application to the dispute."

In another decision that plaintiffs cite, Nessell (phonetic) versus Whirlpool, a Northern District of Ohio case, from 2008, the court nowhere addressed the Adequate Remedy Rule at all. But merely said that a plaintiff could plead a contract claim and an unjust enrichment claim in the alternative, even though the existence of the

contract, if ultimately established, would bar recovery under unjust enrichment.

Washington. The Washington Supreme Court affirmed dismissal of an unjust enrichment claim explaining that. And I quote, "to the extent that plaintiffs have a remedy at law, they are not entitled to pursue a remedy in equity." That's the Seattle Professional Engineering Employees Association versus Boeing case cited in our opening brief at, I think, page 40. I can't read my own handwriting.

Plaintiffs' sole response here is to argue prematurity, for which they rely on U.S. ex rel Kester, a Southern District of New York case from 2014. Kester relied on cases decided under the False Claims Act, in which unjust enrichment actions are governed by federal common law. As such, Kester does not involve Washington state law, nor does it call into question the established limitations that the State of Washington has applied to its law.

That ends the first part of the argument, the adequate remedy at law component of the unjust enrichment argument. I'm happy to stop here if Your Honor would like to hear from plaintiffs as to that issue.

There are two other issues: The direct benefit issue, and then in addition to that, there are some one-off issues with respect to New Jersey and New York, remuneration and duplication. I can be very brief on those remaining issues. But if Your Honor prefers that I allow plaintiffs to respond now on the adequate remedy at law issue, I'll sit down.

THE COURT: Why don't we take up the adequate remedy. Let me hear the plaintiffs' response on that. Thank you, Mr. Biersteker.

MR. BIERSTEKER: Thank you, Your Honor.

THE COURT: Ms. Wolchansky, are you going to --

MS. WOLCHANSKY: Judge, I'll make this pretty simple. I presented -- I have a PowerPoint that I handed to the court reporter that addresses this briefly. It is fully briefed on adequate remedy at law. And we are prepared to rest on the papers with respect to that argument.

THE COURT: Let me see if I have it.

MS. WOLCHANSKY: I can file this as well, as I did last time.

THE COURT: Okay. So this was what was labeled last time, right? And this is what it's labeled today?

MS. WOLCHANSKY: It's updated. The first one addressed the reasonable consumer standard, and this one addresses unjust enrichment, and later express warranty.

THE COURT: All right. Anything further on that?

MS. WOLCHANSKY: I have nothing further on adequate remedy at law.

THE COURT: All right. Mr. Biersteker, if you want to take up the other issues.

MR. BIERSTEKER: Thank you, Your Honor.

For four of the 12 states, Michigan, New Jersey, North Carolina, and Ohio, a plaintiff must confer a direct benefit on the defendant to support their unjust enrichment claim. In our briefs we cited state and federal cases applying each of the four states' laws, affirming -- or affirming the dismissal of claims by plaintiffs who did not confer the requisite direct benefit on the defendant. And in a number of those cases, the lack of a direct benefit stems from the fact that the plaintiffs in the case had purchased the item in question from a retailer, rather than the manufacturer who they had sued.

For three of those four states, Michigan,

North Carolina, and Ohio, plaintiffs' opposition relies only on unpublished federal court decisions that impose a less stringent rule than the states' own courts have applied.

In New Jersey, plaintiffs rely on a single federal decision, Stewart versus Beam Global Spirits & Wine -- a case that's also in their PowerPoint, I noted -- that disagreed with the rule applied by, quote, "the vast majority of courts in the district," as the court itself acknowledged, and that other courts have subsequently refused to follow, including in the Fishman case decided in our reply brief at page 32.

THE COURT: What was the date of that district court case?

MR. BIERSTEKER: The original district court case relied upon by plaintiffs is 877 F.Supp. 2d, 192. It's a 2012 case.

THE COURT: And who is the judge?

MR. BIERSTEKER: Gosh, Your Honor, I'll have to look. I cannot recall. I'll advise Your Honor on that momentarily.

THE COURT: All right.

MR. BIERSTEKER: The subsequent case that we discuss in our brief, the Fishman case, was

decided in April of 2013, so a year later.

We'll have to get back to Your Honor. I did not bring the case with me, so I cannot tell you who the judge was. I apologize.

THE COURT: That's all right.

MR. BIERSTEKER: At the end of the day, plaintiffs urge this Court really to find that indirect benefits are somehow direct. And there is no reason to do that contrary to the law of the four states.

Again, unjust enrichment is a gap filler. These four states have chosen to draw that doctrine narrowly, likely because numerous legal remedies already exist for consumers who have suffered as a result of deceptive advertising. And I urge Your Honor to follow the case law from the states themselves.

I think it would make sense, Your Honor, for me to address the two sort of minor points with respect to New Jersey and New York before I sit down.

THE COURT: Okay.

MR. BIERSTEKER: Plaintiffs' unjust enrichment claims in New Jersey and New York are also foreclosed for an independent reason. In New Jersey, the New Jersey Supreme Court has held that for unjust

enrichment a plaintiff is required to show, and I quote, "that it expected remuneration from the defendant at the time it performed or conferred a benefit on the defendant, and that the failure of remuneration enriched defendant beyond its contractual rights." That's the VRG Corp. versus JKN Reality Corp., cited in our reply brief at pages 32 and 33.

Here, plaintiffs make no such allegation in their complaint that there was an expectation of remuneration from the defendant.

As to New York, in New York, an unjust enrichment claim will not lie where it simply duplicates a conventional claim at law. And the way the New York courts have construed what is duplicative is where the action for unjust enrichment, quote, "stems from the same underlying allegation as the legal claim." The doctrine is broader than an Adequate Remedy Rule, because it does not require that the claim being duplicated satisfy any other criteria, such as providing an adequate remedy. The duplication makes it more clear that plaintiffs' claim under New York law must be dismissed.

Unless Your Honor has questions, those

cover the subsidiary points.

THE COURT: All right. Thank you, Mr. Biersteker.

MR. BIERSTEKER: Thank you.

THE COURT: Ms. Wolchansky, do you have something on these two issues?

MS. WOLCHANSKY: I will respond just very briefly, Your Honor, on the direct purchase. If we could put that up on the screen.

With respect to Michigan, Your Honor, defendants' contention that Michigan requires a direct benefit has been rejected in the In Re: Auto Parts Antitrust Litigation. The U.S. District Court for the Eastern District Michigan held that "Michigan law does not require a direct benefit to be conferred directly by plaintiff to a defendant." And the cite for that case is 29 F.Supp. 3d 982, at 1021. That's a 2014 case.

THE COURT: Do you know who the judge is on that case?

MS. WOLCHANSKY: I don't, Your Honor. I'm sure somebody can look it up. I don't. It's Eastern District of Michigan 2014.

It's also significant to note that the In Re: Auto Parts court distinguished the lone case that

the defendants cite in their brief, A&M Supply Company versus Microsoft, which is 2008 Westlaw 540833. Specifically in In Re: Auto Parts, the court noted that in A&M Supply, the state appellate court dismissed the case for failure to prosecute. And, therefore, its discussion of the merits of the indirect purchaser plaintiffs' claims for unjust enrichment, under Michigan law, based upon lack of direct contact with the defendant and lack of direct payment is in dicta. And that's at 1021.

With respect to New Jersey, there is a decision, Stewart versus Beam Global Spirits, finding sufficiently direct relationship for an unjust enrichment claim where there are false claims or misrepresentations directed for the purpose of generating retail sales, and where those retail sales could have the effect of increasing the amount of wholesale sales to the manufacturer.

And did we find the judge --

MR. REESE: That's Judge Noel Hillman, H-I-L-L-M-A-N.

THE COURT: Thank you.

MS. WOLCHANSKY: It would be inequitable under New Jersey law to allow the defendants to insulate themselves from liability by simply

asserting that retail sales cut off any relationship between the consumer and the manufacturer. And, Judge, the Miller case is Judge George Steeh, S-T-E-E-H.

With respect to North Carolina, we would submit the relevant case is Metric Constructors case. Under North Carolina law it is sufficient for a plaintiff to prove that it has conferred some benefit on the defendant without regard to the directness of the transaction. That's a Fourth Circuit case that we believe is controlling here.

And finally --

THE COURT: Do you know who the panel is on that Fourth Circuit case?

MS. WOLCHANSKY: I don't.

THE COURT: That's unpublished.

MS. WOLCHANSKY: I don't know who it is. Reed is busy back there on his iPhone. But I don't, Your Honor.

And in Ohio, the relevant direct purchase case is, we would submit, the Paikai case, which is 2009 U.S. District Lexis 8538.

I think they were looking for the panel.

That's all I have on the direct purchase, Your Honor. And we briefed the other arguments and

are prepared to rest on the briefs.

THE COURT: All right. Anything else you want to say on that, Mr. Biersteker?

MR. BIERSTEKER: No, Your Honor. I think I addressed most of those cases in my opening remarks.

THE COURT: All right. Did you want to go to the express warranty issue, or is that the one you wanted to submit?

MR. BIERSTEKER: Yes, Your Honor. The special warranty would be next on the agenda.

THE COURT: All right. Okay.

MR. BIERSTEKER: Go ahead.

MS. WOLCHANSKY: The panel, Your Honor, in the Fourth -- I think it was the Fourth Circuit -- is Judge Williams, Michael, and Shedd, with two D's.

THE COURT: All right. Thank you.

Mr. Biersteker.

MR. BIERSTEKER: Yes, Your Honor.

Express warranty. Plaintiffs' express warranty claims are defeated in some of the states because of the failure to give pre-suit notice or lack of privity. The pre-suit notice issue arises in six of the states: California, Florida, Illinois, New Mexico, New York, and North Carolina. It's indisputable that plaintiffs neither gave the

requisite pre-suit notice, nor specifically allege that they have done so.

Plaintiffs' complaint, to be sure, generally alleges, at paragraph 456, that plaintiffs performed, quote, "all conditions precedent to defendants' liability," close quote. But to the extent that that global ambiguous allegation was met to subsume the providing of the requisite pre-suit notification in these states is indisputably false. Plaintiffs never gave such pre-suit notice of their claim for alleged breach of express warranty. And they neither assert nor specifically allege otherwise. In any event, I submit that their global allegation is legally insufficient.

One of plaintiffs' principal cases, the Rust-Oleum case, for example, teaches -- and I quote, "to sustain a breach of warranty claim, the law still mandates that a complaint provide factual allegations sufficient to establish pre-suit notice." Neither plaintiffs' global pleading, which does not even mention notice, nor their actual failure to provide the pre-suit notice fulfills a recognized principal purpose of the pre-suit notice requirement. Especially in cases like this one that are not for personal injury damages; namely, defendants were

deprived of the opportunities to prior to suit to cure the alleged breach, to minimize their exposure, or to prepare for litigation. Nor is it somehow premature, as plaintiffs claim, for this Court to decide now whether the lone global ambiguous allegation in paragraph 456 of the complaint legally fulfills their pre-suit notice requirement, especially when there has been no allegation and can be no allegation that, in fact, the pre-suit notice was provided.

Unlike Rust-Oleum, again one of the cases upon which plaintiffs principally rely, deciding that legal issue here on a motion to dismiss is appropriate. It would not be unreasonably burdensome. In Rust-Oleum, the issue arose under the UCC, where you have to give a reasonable notice, and promptly after discovering the facts relating to it. Some of the plaintiffs had done, some of them had not, and so it was a complicated issue that the court deferred until later. That's not the situation here.

Plaintiffs do not otherwise contest that the failure to give pre-suit notice defeats their claims under Florida and New Mexico law. They do, however, make three scattershot arguments about four remaining states. In Illinois, plaintiffs assert

that the defendant's alleged actual knowledge of the misconduct suffices. But it does not, as the Illinois Supreme Court held in the Connick case cited in our brief on page 35 -- our reply brief on page 35, and our opening brief at 66. In Connick, the Illinois Supreme Court said it is not enough that a manufacturer is aware of problems with a particular product, which frankly a manufacturer likely knows better than consumers anyway, but instead, the defendants must be made aware of the buyer's claim.

Plaintiffs next maintain that in three of the states, Illinois, North Carolina, and New York, the filing of the complaint itself somehow constitutes pre-suit notice. It does not, except in personal injury cases, as those courts in those three states have all recognized, with the authority cited on pages 35 to 36 in our reply, and in particular in Note 24. For example, as the North Carolina Supreme Court reasoned in a 1981 decision, in a suit for personal injuries notice provides no opportunity to cure the alleged breach, because the injury has already occurred. And accordingly, compliance with the notice requirement is excused.

In California, plaintiffs argue that the pre-suit notice requirement does not apply to suits

brought by an indirect purchaser. And they cite a case, Zapata Fonseca versus Goya Foods, Inc., a Northern District of California case, from 2016, that had relied upon a 1963 decision from the California Supreme Court for an exception. But as a district court explained in an MDL proceeding, in which a similar argument was raised, that 1963 decision limits the exception to the pre-suit notice requirement to strict products liability cases in tort. That's the Metro Corp. case out of the Middle District of Georgia, in 2015, in our brief.

Here, plaintiffs are proceeding on a contract theory, not strict liability in torts. It's not a personal injury case. And, therefore, the Court here, in applying California law, should do as the court in Mentor did, which is to hold that the failure to provide the requisite pre-suit notice is not excused.

There is one additional issue with respect to the warranty claims, Your Honor, that I think it might make sense for me to address, since I can do it in fairly short order. But it deals with privity and it deals with three states. If you would rather hear the response from --

THE COURT: No, go ahead.

MR. BIERSTEKER: Fine.

In three of the states, Florida, Illinois, and New York, plaintiffs' express warranty claims are barred because of the lack of privity. Plaintiffs do not allege that they are in privity with any defendant. Nor do plaintiffs dispute that privity is generally required under the three states' law for express warranty claims. So the issue before Your Honor is whether this case falls within an exception to the general rule requiring privity for express warranty claims in those three states. The plaintiffs' claim that all three states recognize an exception for misrepresentations on product packaging or labels. And while the three cases cited by plaintiffs do say that, the courts in all three states routinely dismiss express warranty claims based on product packaging and labels, in cases that involve economic loss. Courts applying all three states' law have also specifically considered requests for an exception to the privity requirement, but declined to do so after reviewing the relevant state law.

In Keith versus Ferring Pharmaceuticals, Inc. -- that's a Northern District of Illinois case from 2016, in our reply brief at 36 to 37 -- the

Court considered an argument just like the one plaintiff is advancing here, but concluded, after reviewing Illinois law, that the Illinois Supreme Court -- and I'm quoting, "The Supreme Court in Illinois has yet to extend express warranties to nonprivity plaintiffs." This Court should not go further than the Illinois Supreme Court in creating an exception to that state's privity requirement.

In Hill versus Hoover -- this is a Florida case -- the court reviewed the cases supposedly supporting the exception that plaintiffs invoke here, and found them unpersuasive as a matter of Florida law. That was a Northern District of Florida case in 2012.

Finally, Ebin is a case in New York, E-B-I-N, from 2013. And there, the court found that the argument for a privity exception relied on cases that predated key changes to New York law. They all arose prior to the time New York adopted the UCC, which imposed the notice requirement. And prior to that New York common law did not require it. I submit that the cases relied upon by the defendants with respect to this issue are more reasoned applications of the relevant states' laws, and the Court should follow their lead in rejecting the

exception that plaintiffs propose.

If Your Honor has no questions, I'll sit down.

THE COURT: All right. Thank you, Mr. Biersteker.

MR. BIERSTEKER: Thank you.

THE COURT: Ms. Wolchansky, are you going to respond on this?

MS. WOLCHANSKY: I am. Thank you, Your Honor.

THE COURT: Ms. Wolchansky.

MS. WOLCHANSKY: I'd first like to highlight -- I'll go briefly through a lot of this, since most of it is addressed very directly in the briefing, and I won't regurgitate that here.

I will point out that several of the defendants' cases actually support plaintiffs' arguments. In the In Re: Clorox Consumer Litigation case 894 F.Supp. 2d, 1224, which is a Northern District of California case, the court found that there was a breach of warranty claim, and an exception to the privity requirement when the plaintiff relies on written labels or ads of the manufacturer. That's case that the defendants cited. I believe it might have been in the unjust

enrichment, but it actually supports our contention here that a breach of warranty can stand. Likewise, the Williams versus Beechnut Nutrition Corp. 229 Cal. Reporter 605, an express warranty claim survived because defendants utilized advertising media to urge use and application of product, and warranted it was effective, proper, and safe for intended use.

On the pre-litigation notice topic, there is so much knowledge of the breach here. I mean, Your Honor heard extensive argument the last time we were before you on the consumer issues, but it's plentiful. It's in the complaint. The FDA, the FTC, there have been warning letters on these very issues. So to suggest, just kind of in the abstract, what is the purpose of this actual knowledge requirement under the UCC to make sure that the defendant can go ahead and cure the conduct, well, there is no question that they've had knowledge of these claims. The FDA has made them quite aware in the warning letter, and they've been in negotiation to cure the very misleading representations that are at issue in this case. So, as a preliminary matter, to suggest there is no knowledge seems a little bit absurd in our opinion.

We would direct the Court, of course, to

the Rust-Oleum case, which is Judge St. Eve, 155 F.Supp. 3d 772, cited in our brief. And also the Caterpillar case, which is 2015 Westlaw 4591236; the Hydroxycut case, 801 F.Supp. 2d 993. All of these cases are on point. It is not required to have notice, and also premature, at the pleading stage, without more evidence to make a determination as to whether there was knowledge.

Again, as Mr. Biersteker pointed out, there are in fact exceptions to this notice requirement, which we, of course, would state have -- have happened here. Here, we have New York. I talked about the Hydroxycut case.

In California, it doesn't apply when a breach of warranty -- breach of express warranty claim, if they haven't dealt with that manufacturer. That's Fonseca versus Goya Foods case. North Carolina is the Maybank case. If there is a filing of a complaint, that can be notice. In Illinois, no notice is required where the seller's direct knowledge of the defect is alleged. And again, we've alleged that here.

So we would direct the Court to these cases, which we believe establish we don't need actual knowledge. Although we assert that there is

unquestionably knowledge here.

Briefly, on the privity issue, the Florida federal courts have recently denied motions to dismiss claims for breach of express warranty in cases with facts very similar to ours. And most of these cases postdate the single case that defendants have cited in their brief, which Mr. Biersteker again here today relied upon, which is the Hill versus Hoover case, 899 F.Supp. 2d 1259. Smith versus WM Wrigley, Jr. Company, 663 F.Supp. 2d 1336 is on point. That case, the plaintiff filed a class action against Wrigley, taking issue with its claim that Eclipse gum is scientifically proven to help kill germs, as a result of a natural ingredient. Various causes of action in that case, including breach of express warranty. Wrigley filed a motion to dismiss arguing, as the defendants do here, that express warranty is not viable absent privity, and concluding that because Smith didn't directly buy from Wrigley, he could not establish the existence of that element. The court denied the motion, noting first that while Florida law is clear requiring privity to recover for the breach of an implied warranty, not an express warranty, the Florida Supreme Court has not provided similar clarification for express warranty claims.

So distinguished an implied warranty from an express. And while the court declined to resolve the issue of whether privity is ever required for express warranty claims, it did find in that case, given the particular facts, the analysis is straightforward. And importantly, one, it defies common sense to argue that purchasers of the gum presumed that the cashier at the local convenience store is familiar with the scientific properties of the MBE, which is the ingredient there. Two, it is significant that the express warranty the manufacturer allegedly breached is contained on the package, as it is here in this case. And three, the complaint alleged there that plaintiff relied on the warranty when purchasing the gum. So, in that case, the court concluded that the plaintiffs stated express warranty despite the lack of privity.

We would also point Your Honor to the Kahru case, K-A-H-R-U, which is a Southern District of Florida decision, 2013 U.S. District Lexis 112613, explaining that express warranties were contained on the package and in the advertisements, both clearly directed to the end purchaser, and holding that privity was not required for a breach of express warranty case.

The Garcia versus Kashi case, 43 F.Supp. 3d 1359, a Southern District of Florida case from 2014; again an express warranty claim survived despite the lack of privity.

And finally, again in a more recent case than the Hill versus Hoover case that the defendants are relying upon, is the Bohlke, B-O-H-L-K-E, versus Shearer's Foods, S-H-E-A-R-E-R'S, Foods, 2015 U.S. District Lexis 6054.

In Illinois there are several cases on point. Again, on this lack of privity issue we would direct the Court to the Mednick versus Precore case, 2014 U.S. District Lexis 159687, conferring that a manufacturer's documents given directly to the buyer prior to the purchase may give rise to an express warranty because they become the basis of the bargain.

There is an exception if the manufacturer expressly warrants its goods to the ultimate consumer. The Baldwin versus Star Scientific, Inc., 78 F.Supp. 3d 724. This case was actually cited by the defendants.

Again, in that Mednick case, the Court found that brochures, documents, and advertisements may constitute a sufficient basis for an express

warranty.

The cases cited here, Your Honor, all provide for express warranty despite a lack of privity, which is what we believe should be the determination in this court as well.

Finally, in New York, there is recent authority supporting the notion that the New York Court of Appeals has dispensed -- which is of course the highest court in New York, which is always very confusing if you don't practice there -- has dispensed with the requirement of privity in cases involving breach express warranty where only economic damages are alleged. That's the Mahoney versus Endohealth Solutions case, 2016 U.S. District Lexis 94732. And there, importantly, the court concluded that privity is not required, and allowed express warranty claims to proceed. What's important about this case, Judge, is the Mahoney case postdates the Ebin case, which is the case that the defendants rely upon. More recent authority does not require privity between a consumer and a manufacturer, where the plaintiff alleges breach of warranty and seeks economic damages.

That is all I have, Your Honor, on express warranty.

THE COURT: All right. Thank you, Ms. Wolchansky.

MS. WOLCHANSKY: Thank you.

THE COURT: Mr. Biersteker, anything further on express warranty?

MR. BIERSTEKER: Just very briefly, Judge.

First, there is no dispute that the pre-suit notice was not given.

Second, as to the exception that plaintiffs would perceive, I think it's narrower than that which they argue for. Again, I'm not saying that there aren't cases that use language that either side could seize upon to support their position. But I think, if you look at the reasoning in those cases, the cases relied upon by the defendants are superior.

I must say, the Mahoney case in New York is not one that was cited, I don't think, in anybody's brief. It's not one that I've read, and I'm unfortunately not in a position to specifically address that case out of New York.

THE COURT: All right.

MR. BIERSTEKER: Thank you.

THE COURT: What do you want to go to next? You wanted to skip the injunctive relief?

MR. BIERSTEKER: No, I wanted to do the

injunctive relief.

THE COURT: You wanted to do the injunctive relief, okay.

MR. BIERSTEKER: As Your Honor may recall from our last outing in June, as to the menthol theory, Your Honor specifically asked why didn't Santa Fe drop the additive-free tobacco claim, at least with respect to its menthol cigarettes. And while the Santa Fe Natural Tobacco Company has executed a memorandum of agreement with the FDA, under which it will do precisely that before the end of this year, in fact it will do more. Pursuant to the memorandum of understanding, Santa Fe Natural Tobacco Company -- which I'll shorthand as "Santa Fe" -- will cease using the terms "additive-free" and "natural" to describe the tobacco in the Natural American Spirit cigarettes, in both ads and on the packs.

And pursuant to the FTC's subsequent letter guidance, Santa Fe Natural Tobacco Company will modify the disclaimer. Let me explain. Since Santa Fe will no longer be claiming that the tobacco in Natural American Spirit cigarettes is additive-free, the current disclaimer, "No additives in our tobacco does not mean a safer cigarette," will be

generalized. And the generalized disclaimer will say, "Natural American cigarettes are not safer than any other cigarettes." That moots plaintiffs' request to enjoin Santa Fe from continuing to use the phrases "additive-free" and "natural" to describe the tobacco in Natural American Spirit cigarettes.

I would point out that Santa Fe will continue to be permitted to use the word "natural" in the brand name. The brand will still be Natural American Spirit. I would note that the complaint, which is the operative document here on a motion to dismiss, seeks to enjoin Santa Fe's false and deceptive practices. But it discusses and focuses on the use of "additive-free" and "natural" to describe the tobacco in Natural American Spirit cigarettes. There is no allegation in the complaint that "natural," specifically as used in the brand name or the trademark is false or misleading, and no requests specifically to enjoin Santa Fe to change the brand name to omit the word "natural" in it. To the extent that plaintiffs do seek to enjoin the use of the word "natural" in the brand name or the trademark, defendants do not assert that it is moot at this point.

Defendants do believe, however, that in the

event there is such a claim, although, again, it is not apparent on the face of the complaint, it should be dismissed for other reasons, including plaintiffs' inability to allege plausibly that "natural" in the brand name alone misleads consumers.

Indeed, as to the menthol theory, Your Honor indicated on June 9 anyway, that you were focused more on "additive-free, the descriptor "additive-free," as applied to the tobacco, as opposed to "natural." And, in any event, I would submit it is implausible that consumers would be led by the brand name alone, Natural American Spirits, that cigarettes that are labeled as menthol, that are bought because they are menthol, that they somehow will be led to believe that they do not contain menthol.

I might also add that in his exposition on the question "what is menthol" at the June 9 hearing, Mr. Schlesinger noted that menthol can be either synthetic or natural. The menthol in the Natural American Spirit cigarettes is natural. In fact, it's organic.

So with that, I don't have anything further, unless Your Honor has questions regarding the injunction issue.

THE COURT: Well, I may. Let me hear from Ms. Wolchansky. And then I may have some questions. Thank you, Mr. Biersteker.

Ms. Wolchansky.

MS. WOLCHANSKY: Judge, I'll start, just briefly, with the suggestion that our complaint, which is the operative complaint before Your Honor, somehow doesn't touch on the brand name as using "natural" as part of the deception here. I mean, I only just read the first two pages of the complaint, but I am happy to share just a couple of the paragraphs that make it quite clear that the use of "natural," be it in the brand name, or otherwise, is absolutely at the heart of this case. The very first paragraph under "nature of the case," paragraph 1 states, "This action seeks to redress defendants' Santa Fe Natural Tobacco Company, Inc., Reynolds, RJR, deceptive marketing of their, quote, 'Natural American Spirit' brand cigarettes as 'natural' and 'additive-free.'"

Paragraph 4, "By uniformly using the terms, quote, 'natural' and 'additive-free' on each and every label, defendants intentionally and successfully convey to reasonable consumers that Natural American Spirit cigarettes are safer and

healthier to smoke than other competing cigarettes."

"They use the terms natural and additive-free through a pervasive nationwide marketing and advertising campaign." That was paragraph 5.

I think, Judge, it's in every second or third paragraph in the entire complaint. So to suggest that this case isn't about the brand name or the use of "natural," wherever it may occur on the packaging, is just not true. So the brand name alone absolutely can mislead and confuse consumers. That's the entire case. And as Your Honor has stated earlier today, the complaint more than plausibly alleges that reasonable consumers could be misled by the use of those terms.

Regarding the agreement to change the labeling and the disclaimer, a couple of very important points that absolutely do not moot these claims; moot the use of it in the brand, or otherwise. One, the memorandum of agreement between the defendants and the FDA is not a final document. This is an agreement that they have. Even the defendants in their briefing, and I believe at the last argument stated that is not final. They have, as they've represented to the Court, agreed to make

some changes to their labeling. But this is not a final document.

Importantly, there was a lawsuit filed on June 6, against the FDA, regarding Santa Fe's continued use of the word "natural," alleging that the authorization, without following congressionally mandated process for public input and FDA approval, constitutes agency action that is arbitrary, capricious, and an abuse of discretion, and otherwise not in accordance with the Administrative Procedure Act, 5 USC 7062. So that litigation is ongoing. There is discussion about whether it may or may not be transferred to this Court. So there is --

THE COURT: But that's litigation that the defendants filed against the FDA?

MS. WOLCHANSKY: It's not. It's litigation that was filed actually by Mr. Schlesinger against the FDA for the continued use of "natural" without the FDA going through the correct procedures to seek comment.

THE COURT: So it's a suit to say that this memoranda process is defective because it's not an APA procedure?

MS. WOLCHANSKY: They failed to go through the correct procedure in coming up with this

memorandum of agreement, which includes certain things like seeking comment and input.

So there is by no means finality with respect to the FDA's memorandum of agreement. And that is in defendants' own briefing. To suggest that that memorandum now somehow moots these claims in this case, it's just not true. And, in fact, I understand there may never be a final order. The agreement between the defendants and the FDA might be all there is. They might go ahead and make some changes to the label, which, by the way, they could change back anytime. So it's not moot here.

Oh, and they admitted that the changes are not complete on page 37 of their reply brief.

THE COURT: When you say "not complete," what does that mean? Does that mean that the negotiations are not complete? Is that what you mean by that, or --

MS. WOLCHANSKY: Although Santa Fe has not yet finalized the changes to the label, they are well underway. But nothing is final. So we're taking representations from defense counsel that they are planning to make these changes; that, you know, there is a memorandum of agreement that's not final. But nothing is in a position here for the Court to find

that those claims are moot.

The injunctive relief is incredibly important in this case, Your Honor. This is a public health claim that we allege is causing mass deception. And to, at this stage in the litigation, dismiss those claims because of changes that are supposedly going to happen based on an agreement with the FDA that isn't final, is simply premature.

And again, as Your Honor noted, the FTC consent orders on tobacco do not preempt consumer fraud claims. The same here. So, even if the FDA agreement were final, there is still a right of action in this case for injunctive relief.

That's all I have, Your Honor, on injunctive relief.

THE COURT: All right. Thank you, Ms. Wolchansky.

Mr. Biersteker.

MR. BIERSTEKER: I think I can be pretty brief, Judge.

Let's talk about the case challenging the memorandum of agreement. And let me just point out that the agreement itself is final; its implementation is ongoing. It allows for a seven-month window from the time that the FTC weighed

in on the appropriate disclaimer to use. In light of the fact that the specific claim "additive-free" would no longer be used, it didn't make much sense to have a disclaimer that was specific to additive-free in the tobacco. So when that occurred, which it did, there is a seven-month window with the company to revise its advertising, revise its packaging, to submit that to the FDA for its approval, and then to implement it, which takes some time. It can't be turned around overnight. It's a rather involved process, more than one might think.

So it is wrong to say that the memorandum of agreement is not final. And, indeed, the action to which plaintiffs refer was brought by one of the named class representatives here, Sproul. It was filed on June 6 in the Southern District of Florida. The newly filed complaint is against the FDA. It seems a declaration that the memorandum of agreement is unlawful under the APA, the Administrative Procedure Act, and to set it aside and to enjoin the FDA from entering into or reissuing the memorandum of agreement in any form.

Apart from the apparent inconsistency in Mr. Sproul's position --

THE COURT: So if the plaintiff got the

relief they wanted, it would -- what would it do? Vacate the memorandum?

MR. BIERSTEKER: I guess it would vacate the memorandum. I'm not sure it would vacate the planned activity, number one. I mean, you have to step back a moment. The whole issue with the FDA was really largely a housekeeping issue. And I don't mean that in any pejorative sense. But let me explain. The FDA obtained jurisdiction over tobacco in 2008, I want to say, was when the statute was passed, giving the FDA regulatory authority over tobacco. As part of that, if you're going to be making anything that might be construed as a reduced risk claim, you have to obtain the prior approval of the FDA before you can market it.

With respect to Natural American Spirit cigarettes, and the use of the descriptors "natural" and "additive-free" to describe the tobacco being used in those cigarettes, they were already on the market. And so, when the statute was passed, there was a situation where they were already on the market, and so preapproval could not be sought. And the warning letter really was a way of bringing the issue to a head and resolving the need to obtain FDA approval for a reduced risk claim, if you will, of

additive-free tobacco or natural tobacco. And that's what prompted the warning letter, and that's what prompted the resolution in the memorandum of understanding -- or memorandum of agreement, excuse me.

And so, I think that if you view it in that context, even if the memorandum of agreement itself were somehow superseded, there would still need to be something that occurred. And there is no reason to believe, at this juncture, that the FDA would do anything differently than it's already done.

And I would point out, the reason I started to discuss the Sproul case, was plaintiffs' argument that somehow or another the memorandum of agreement is not final, the Sproul complaint itself says that the memorandum of agreement constitutes final agency action under 5 USC Section 704, dispelling any suggestion, I think, that the parties to the memorandum of agreement will somehow abandon it or not abide by it.

And that leads me, I guess, to my last point on this issue, which is that there was some suggestion that Reynolds could change -- not Reynolds -- Santa Fe could change the packaging and the advertising at any point. And, again, the

advertising is being submitted for FDA approval. I think the FDA may already have the proposed advertising. The packaging is coming over later. Maybe I've got it switched. But they've got one or the other under review.

And in any event, the notion that Santa Fe will not adhere to the memorandum of agreement that it signed with the FDA and risk alienating the FDA and the FTC, both of whom have significant regulatory authority over the company's business, makes no sense to me. It's just not realistic to assume that Santa Fe, having negotiated and having agreed to certain requirements with both the FTC and the FDA is going to somehow walk away from them or change its conduct.

Does Your Honor have any questions?

THE COURT: I don't believe so. Thank you, Mr. Biersteker.

MR. BIERSTEKER: Thank you.

THE COURT: All right. Where do you want to go next?

MR. BIERSTEKER: I think we're finished, Judge, as far as defense is concerned, unless Your Honor has any questions about the supplemental briefing, the 12(b)(6) issue, the other issues that we've agreed to submit on the papers.

THE COURT: I don't believe so.

The plaintiffs certainly hit hard the Court's tentative conclusions about two of the statements, whether I had the ability, given what they had alleged, to, as a matter of law, say that the terms "natural" and then, also -- I guess the word "natural," that I guess I had problems with the first alleged misrepresentation and the third misrepresentation.

They seemed to say that if they have enough studies, they can -- that's enough to get them past the motion to dismiss. If they found that many people that are confused through studies with the word "natural," that I would be in error to find that I don't think a reasonable consumer would be misled by that phrase.

Is there anything further you want to say on that, Mr. Schultz?

MR. SCHULTZ: Your Honor, we think we refuted the idea that they can outsource their requirement. But if the Court wants me to go into further about the Court's ability, and in fact, duty on a 12(b)(6) motion to make this determination as a matter of law at this stage, I'll be glad to.

THE COURT: Well, talk to me, what you

really mean by outsourcing. If they've got studies, that's called evidence. Why isn't that -- I mean, if they've got one judge in New Mexico looking at the word "natural," going, I don't see how anybody can be confused by that," but they've got 500 consumers that are saying that they are confused by it, is that not some evidence that the Court shouldn't rule as matter of law?

MR. SCHULTZ: Well, your Honor, first of all, I think -- let's distinguish two things. The issue here is the plausibility of their allegations. It's not quality of the evidence.

And in our footnote, Your Honor, in going through some of these studies that the plaintiffs relied on, I think the footnotes in our supplemental briefing were very clear to show why those studies, number one, don't say what was alleged. And number two, the questions that were being asked in those studies weren't even the pertinent ones.

But, again, Your Honor, that's not the issue. Just to go back one step, when we were at the last hearing, Your Honor, you asked the question, don't you have the ability to determine as a matter of law whether a reasonable consumer could be confused. You asked that question directly to me.

And I said I believe you do. And your response was: I think that's right. It was the plaintiffs, then, that wanted to have supplemental briefing on this issue as to whether the Court, in fact, had that power, at a 12(b)(6) issue. And they provided no additional information and no legal authority that should dissuade the Court from that.

I mean, as an initial matter, Your Honor, throughout the briefing, in both our initial motion, in our reply brief, and at the supplemental brief -- and I can give you the precise pages and footnotes, if the Court wants to be directed -- we provided the Court with numerous examples where federal courts do precisely that; that, in ruling on a 12(b)(6) issue in a consumer deception claim, courts rule as a matter of law whether, in fact, the alleged misrepresentation would deceive the reasonable consumer.

The only case that the plaintiffs really came back with was the Williams versus Gerber Products case, a 2008 case from the Ninth Circuit. And, Your Honor, the case is very short. It's very clear what the Ninth Circuit did there. The Ninth Circuit reversed the district court holding with regard to whether the alleged misrepresentation would

deceive the reasonable consumer. That much is true. The Ninth Circuit reversed the district court's finding. But the Ninth Circuit did not reverse the district court, because it held the district court improperly, on a motion to dismiss, ruled on this question.

In fact, Your Honor, in the second to the last page of the opinion, the Ninth Circuit flatly says: We just disagree. So it wasn't as a matter of law that they disagreed on whether the district court has the power to do so. They just came to a different conclusion.

And in our supplemental brief, Your Honor, we provided the Court with numerous cases within the Ninth Circuit, both at the circuit court level and the district court level that, since 2008, since the Williams case, where the courts have continued to grant motions to dismiss on reasonable consumer claims, and the Ninth Circuit has repeatedly affirmed those rulings.

And, specifically, Your Honor, if you look at our supplemental brief in Footnote --

THE COURT: I don't want to rush you, but I've got to give Ms. Bean a break.

MR. SCHULTZ: Anytime, Your Honor.

THE COURT: Why don't we take a break here, and then come back and let you finish your remarks.

All right. We'll be in recess for about 15 minutes.

(The Court stood in recess.)

THE COURT: All right. Mr. Schultz, if you wish to continue your argument on the misrepresentations.

MR. SCHULTZ: Well, Your Honor, I won't belabor the point that we made in our supplemental briefing in response to -- the whole reason why the plaintiffs asked to have supplemental briefing was challenging this Court's authority to make that determination. It's clear that the Court does have this authority. We provided the Court with any number of examples from district courts and appellate courts from around the country that all have found -- to use the words you used right before the break, Your Honor, that one judge has the ability to look at the allegations and make a determination as to what a reasonable consumer would find to be misleading.

The other issue, Your Honor, that we raised with the Court that I'm sure I don't have to remind you about, was your ruling in the SEC versus Goldstone case. You raised that at the last hearing

about: Why is this any different than what you do in a securities case? Plaintiffs said, Well, it's different, Your Honor, because there is a higher pleading level, it's a Rule 9 fraud level. Well, the SEC versus Goldstone case, that you decided in 2013, that was not based on a fraud level of pleading. That was based on Rule 8. And in your opinion, Your Honor, your 300-some-odd page opinion, you found no problem in dismissing four of the SEC's claims based on what a reasonable investor or a reasonable consumer, a reasonable person, would find to be misleading.

That's precisely what the Court has the ability to do here. Your Honor, you have the authority. And simply because there is a study that is cited, or even if there were multiple studies, the fact of the matter is, Your Honor, if that's all it took for a plaintiff to do, to avoid a motion to dismiss, then no court would ever be able to grant a motion to dismiss on a reasonable consumer deception claim. But we know that that's not what courts have done. We know that courts are willing to look directly to the alleged misrepresentation. They look directly to the product. They look directly to the label. And they make that determination.

And as we pointed out in our supplemental brief, Your Honor, on page 7, in Footnote 5, one of the problems with the studies that they're citing, these are studies that do not even look to or ask the question about what consumers think about the disclaimer that's at issue here.

So simply for a plaintiff to be able to say, Oh, we have a study, does not preclude this Court from exercising its ability under Rule 12 (b)(6) to look directly to the alleged misrepresentation, not a study about that misrepresentation, but to look directly to the product itself and make a determination, as you did at the hearing in June, as to what a reasonable consumer would find to be misleading.

THE COURT: All right. Thank you, Mr. Schultz.

Ms. Wolchansky, do you want to respond?

MS. WOLCHANSKY: Yes, Your Honor. Ms. McGinn and I will actually both be responding on this point, but I will open.

Judge, Mr. Schultz is grossly mischaracterizing our position with respect to the Court's ability to assess the claims at the motion to dismiss phase. We explicitly acknowledge, on page 4

of our brief, that the Court has inherent authority to assess the legal sufficiency of the claims. We do argue that -- and this is an important nuance -- it's not that the Court can't, as a matter of law, make a determination. What the Court can't do at this stage is weigh the evidence.

And, as the Court pointed out this morning -- and frankly, it's not one study; it's not, oh, we put one study in our complaint, and the Court has to take that as true. We would submit that that's enough. But there is so much evidence, Your Honor. And I went through that evidence in great detail at the last hearing. It's in the PowerPoint that I didn't go through this morning, but that Your Honor has, and I can file on the docket. There are warning letters from the FDA that, you know --

THE COURT: Before I forget, let's make sure we do file it, so I can cite it when I write the opinion.

MS. WOLCHANSKY: I will file it, Your Honor, this afternoon.

We have the warning letter. We have multiple studies: The 2016 study, the prevalence of reduced harm perceptions clearly demonstrates that a disclaimer is not an effective means to correct the

inappropriate harm perception. We have Judge Kessler. We have all of the plaintiffs in this case. That is not insignificant. They have all alleged that they were misled by the misrepresentations on the packaging. We have Santa Fe's own internal documents. We have a 2007 study. We have 63.9 percent of smokers -- Natural American cigarette smokers believe their brand was less harmful. As Your Honor pointed out, we have thousands of consumers who have believed and been misled by the representation.

So it's not that the Court can't, as a matter of law, ever make a determination at a motion to dismiss. We would not submit that that is the law. But the Court can't weigh the evidence. And here, viewed in the light most favorable to the plaintiffs, taken as true, the allegations in the complaint, there is more than enough here for this case to proceed.

The reason why we cite the Williams versus Gerber case, and that the defendants cite all over their briefing regarding the reasonable consumer standard, in that case it's not that the Court found that it was or wasn't misleading. The Court found it couldn't weigh the evidence; it was a question of

fact for a jury. And there was laughably less evidence in that case than there is here in the complaint.

So, again, it's not that the Court can't, as a matter of law, make determinations. It's that here, when there is plentiful evidence in the complaint, not weighing that evidence, but rather, viewing that evidence in the light most favorable to the plaintiff, we have more than plausibly alleged that there is deception, despite the existence of a disclaimer.

And, again, we aren't trying to -- Mr. Schultz has stated multiple times that we have failed to cite any cases where the Court -- you know, that say that the Court can't make a determination. That's just simply not what we're saying. We're saying that an issue like this is a jury question that the Court should find is a question of fact. And to that point, I will turn it over to Ms. McGinn.

THE COURT: All right. Thank you, Ms. Wolcansky.

Ms. McGinn.

MS. McGINN: Judge, first I want to apologize for missing the last hearing June 9.

THE COURT: We had a lot of fun.

MS. McGINN: Well, June 9 was my dad's 90th birthday.

So I think our supplemental brief talks about more than the Williams versus Gerber case as to why this is a question of fact, not a question of law.

But we missed a case that was just brought to my attention by the brilliant Mr. Bienvenu this week. That is a New Mexico case that I think addresses this issue probably more powerfully than does Williams versus Gerber. And that is your case, Judge: Martin versus City of Albuquerque, at 147 F.Supp. 3d 1298, that you wrote in 2015. And I am embarrassed to say I was unaware of this decision before Mr. Bienvenu found it, but it is what I describe, and I would commend to your clerks and your externs to read, what I can only describe as a love letter to the power of the jury trial that you wrote. And I think it could only have been written by somebody who has actually been in the arena down here in the well of the courthouse and argued to a jury, and seen the magic that happens when people come together. It is really remarkable -- that piece of your opinion is really remarkable, Judge. It talks about why we let juries decide what is reasonable and

what is excessive.

And even though your discussion in that case is about the Sixth Amendment right to a criminal jury trial, all of the amendments have equal importance. And the Seventh Amendment, the right to civil jury trial is as important as the Sixth Amendment right. And all the things you say in that case, I think, are applicable here, Judge. You said in that case "jury trials send a louder and more definitive message to society than judges' opinions." You said "the process is as important to how this story ends to how the public accepts the end of the story, and how the nation or the community decides that the appearance of justice has been satisfied." You said, "In a democratic society, it should not be as important what a district judge believes, as what the citizens in their jury verdicts decide."

But probably the thing that was most touching in the opinion, Judge, was you describing how the process works in New Mexico. The transcendent process that you talked about when, in this fifth largest state, people from all walks of life, from our 21 pueblos, from our four reservations, and people of every race and every creed come together in the courtroom here, and gay,

straight, you list all the different kinds of people that come here, religious, nonreligious, agnostics, all come to this courtroom, and in this sacred space here in the courtroom, make a decision for the whole community, and how powerful that is.

And in this case, Judge, even though you have the power to make a decision about a motion to dismiss at this level -- although we think the case law says where there is a factual dispute, you can't weigh the evidence -- in this case, it is a group of people that should include people who are still smokers, people who have never smoked, people who have smoked and quit smoking, that should decide whether this is appropriate and whether reasonable people could be fooled.

I read the transcript of the four-hour hearing at the last thing, and it made me sorry I missed it, because there was a lively discussion about a lot of these very interesting issues. But I will say, Judge, that the questions you were asking at that hearing are the same kinds of questions that I expect a jury will ask, and will debate in the jury room. Is the word "natural" true, or is that misleading? Can something be technically true, but mislead people anyway? For example, if I sell

strychnine and I label it on the front as "natural and organic," that's true, strychnine is natural and organic. But if I place the thing that it's poison on the side of that, I'm not really telling the whole story when I'm selling that particular product.

Does misrepresentation -- is it based on just one word? Can you pull out the word "natural" and say, Well, just look at the rest of it about is it a misrepresentation? We've cited a case Pernod Ricard USA versus Bacardi, at 653 F.3d 241, a Fourth Circuit case. And it says it's not just one word. It's the whole gestalt, the whole marketing process that they do with the green package, and the Native American smoking, and all of this; the use of the word "natural" several places, both in the branding name and also on the packaging, all of that is what the jury has to assess whether a reasonable person could be fooled.

And it's not just even the whole gestalt of it, Judge. It's even the order that you place it in. I know the Court is familiar with Daniel Kahneman's book, "Thinking Fast and Slow." No matter how smart we think we are, just the order in which you list things can affect you on a subtle level so you disregard the rest. It's why where they're placing

this information on the package is so important. If I tell you: I want you to go out with somebody because they're smart, funny, hard-working, loud, aggressive, and a spendthrift, according to Kahneman, you're likely to go out with that person. But if I just reverse the words: If I say they're loud, aggressive, a spendthrift, smart, funny, and hard-working, you're not going to go out with that person. So even just the order can affect -- and of course, these marketers -- and the tobacco companies know this better than anybody else -- they have all kind of research themselves that show what works on consumers.

If there is anything about your opinion, Judge, that I would find fault with, there is one thing that I think you left out in that opinion. And that is the differences in education between people. And I think that's particularly important when you're trying to determine reasonableness. And it says why it should be a group decision, rather than a decision by an individual person or an individual judge.

You and I have very similar backgrounds. I've come a long way from Alamogordo, and you've come a long way from Hobbs. And we have been incredibly blessed by the educations that we've had. And we

like to I think -- I like to think that I still am in touch with my roots from back there, and I understand what common people and reasonable people think. But, in fact, whenever I do focus groups, I realize that there are people who don't have the benefits that I have, that think differently than I do, and are more easily fooled than I am. And that's why people with advanced degrees should step back and not exercise their authority to make decisions on what's reasonable, and let a jury decide the factual basis for what's reasonable and how people can be fooled.

I want to end with a quote from your case, that you say: "There are times to write opinions and there are times to try cases." And this particular case about whether this fools people or not, this is a case that should be tried to the jury. And I want to thank you for that great opinion, by the way.

Thanks, Judge.

THE COURT: All right. Thank you, Ms. McGinn.

Mr. Schultz, anything further you want to say on the misrepresentations, supplemental briefing?

MR. SCHULTZ: Just very briefly, Your Honor. I'm not one to stand up and be more eloquent than Ms. McGinn. And I hate to follow her in the

courtroom.

There is a reason that case was not cited in any of the parties' briefing. That case dealt with a motion for summary judgment. That case dealt with this Court's determination that there was a triable issue because there were disputed issues of fact and issues that a jury should decide rather than being resolved at a summary judgment stage.

This case, Your Honor, is not at that stage. This case is before you in your function as a gatekeeper, in measuring the adequacy of the pleadings. There are many, many steps between now and a jury trial. And everything Ms. McGinn said about the power of a jury and why we have jury trials is certainly true. But that is not to say that every single case, simply because it is filed, goes to a jury. Why? Because there are rules. There are requirements that must be met before we get to that stage. And I assume, Your Honor, that if we get to the summary judgment stage, we will hear the precise same argument that Ms. McGinn just gave, and probably citing the Martin case back to this Court, as well it should be cited at that stage.

But at this stage, Your Honor, the more important opinion for this Court to look to is not

your opinions, Your Honor. It's what the U.S. Supreme Court has told you is your obligation as a judge as to what must be satisfied by the plaintiffs in their pleadings before the case goes forward.

And we would urge the Court to look at the Supreme Court's rulings in Twombly and Ashcroft. Look at the cases that we've cited to the Court with regard to what other district courts and other courts of appeals have done in looking at the alleged misrepresentation, as set forth in the pleadings, and measuring the adequacy of those allegations against the actual misrepresentation, and that, in making the decision, as a matter of law, whether those would deceive a reasonable consumer.

THE COURT: Thank you, Mr. Schultz.

Mr. Schultz, Mr. Biersteker, do y'all have anything else on your motion to dismiss that you want to argue or bring up?

MR. SCHULTZ: I think we're done, Your Honor.

THE COURT: All right. Ms. Wolchansky, is there anything further you want on the motion?

MS. WOLCHANSKY: Nothing further.

THE COURT: All right. So if I understand it, it's now in my court. And the way we've got it

scheduled is that nothing happens until I issue written opinions and orders on this. Is that everybody's memory? My oral inclinations up here don't get it done. I have to put an order in place before y'all start filing answers and things. Is that the way the plaintiffs understand it?

MR. SCHULTZ: Your Honor, certainly as to the answer, that's correct.

THE COURT: Isn't that the next thing after me? After I get the opinion and order out, then the answers take place on our case management order?

MR. SCHULTZ: With regard to the pleading stage, that's correct, Your Honor.

THE COURT: Okay.

MS. WOLCHANSKY: We are continuing to conduct discovery and meet and confer. We will come to the Court if we have any issues in discovery that we need Your Honor's assistance with.

THE COURT: All right. Well, I'll see what we can do about me trying to finish this opinion up. I'm a little bit concerned about -- I've got a trial I'm doing for the judges up in the Northern District of Oklahoma right at the beginning of September, and it's beginning to overshadow a lot of stuff I'm trying to do here. So it may be a little bit after

that before I can really devote full-time to getting this opinion out. So be a little bit patient with me as I try to get that out. We've got a New Mexico judge in Tulsa, Oklahoma, with New York lawyers, deciding Delaware law.

MR. BIERSTEKER: What could possibly go wrong?

THE COURT: It's good ole America, right? Be patient with me. I'll try to get that thing put to bed.

All right. I appreciate your presentations. Be safe on your trips back. I'll try to get this out to you as soon as possible.

I'm going to get organized up here, so don't pay any attention to me. Y'all have a good day.

C-E-R-T-I-F-I-C-A-T-E

UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR, Official Court Reporter for the State of New Mexico, do hereby certify that the foregoing pages constitute a true transcript of proceedings had before the said Court, held in the District of New Mexico, in the matter therein stated.

In testimony whereof, I have hereunto set my hand on July 26, 2017.

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